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82-1810

NO._____

SUPREME COURT OF THE UNITED STATES

OCTOBER 1982 TERM

DAN AND SANDRA (GORENA) DILLARD,
PETITIONERS

VS.

WILLIAM H. BROYLES, REYMUNDO SANCHEZ,
AND JOHN FREELAND, RESPONDENTS

ON APPEAL FROM THE SUPREME COURT OF
TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

QUESTION NUMBER 1: May a State constitutionally enforce a State statute whose defacto effect is to allow foreclosure upon property on which there has been no actual or constructive notice of foreclosure to the owners thereof?

QUESTION NUMBER 2: May an attorney who has represented a buyer and a seller in a real estate transaction, and who has named himself as Trustee for foreclosure purposes, constitutionally and ethically later foreclose against his "former clients" on that same property?

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OFFICIAL/UNOFFICIAL REPORTS & OPINIONS

This case has been reported in 633 SW2d 636-645 and styled: Dan Dillard, Jr. and wife, Sandra L. (Gorena) Dillard, Appellants v. William H. Broyles, et al, Appellees. This is an opinion by the Corpus Christi, Texas Court of Appeals Number 1862, said opinion being rendered April 22, 1982, Rehearing denied May 13, 1982. (The applicable portions of Dillard, supra, appear in the Appendix at A-1 to A-24).

JURISDICTIONAL GROUNDS

The Texas Supreme Court denied Appellants' Motion for Rehearing on February 2, 1983 (See Appendix herein, page A33).

CONSTITUTIONAL PROVISIONS, STATUTES, ETC.

This case involves the constitutionality, as applied, of Article 3810, Texas Vernon's Annotated Civil Statute. The applicable part of

Article 3810 is attached hereto and appears on page A25 of the Appendix. Pursuant to Rule 28.4(c), Rules of the U. S. Supreme Court, the constitutionality of Article 3810, supra, is questioned herein. Therefore, 28 U.S.C. Section 2403(b) may be applicable and the Texas Attorney General is notified as therein required. No Court has, to Petitioners' knowledge, certified to the Attorney General of Texas, the fact that the constitutionality of Article 3810 is drawn in question. Additionally, Petitioners herein seek to invoke the protections of the Fifth and Fourteenth Amendments of the United States Constitution, and 42 U.S.C. Section 1983.

STATEMENT OF THE CASE

This case involves a foreclosure against Petitioners' home located in Pharr, Texas, under the provisions of a

Deed of Trust dated December 23, 1974. The facts are undisputed that in December of 1974, Petitioners' purchased a home that had been constructed by Respondent Reymundo Sanchez. Respondent/Attorney John Freeland drew up all of the instruments involved in this transaction and charged a fee to both Petitioners herein and Respondent Sanchez. Among the instruments that Respondent/Attorney Freeland drew up was a Deed of Trust and a Note. Respondent/Attorney Freeland named himself as Trustee. The holder and beneficiary on the Note involved herein at all times was Respondent Sanchez. A dispute arose between Plaintiffs' herein and Respondent Sanchez over alleged defects in the workmanship since Respondent Sanchez had not only

partially financed Petitioners' purchase, but had also constructed the house. The evidence is further undisputed that in March of 1979 Respondent/Attorney John Freeland sent Notice of Trustee's Sale to the Petitioners telling his "ex-clients" that he, attorney John Freeland intended to foreclose on the property involved herein (using the same instruments and same property in which he initially represented both sides).

The evidence is undisputed that Respondent/Attorney Freeland actually did mail these notice of Trustee's Sale to Petitioners herein. However, the evidence is also undisputed that Petitioners never received these notice of foreclosure sale, and the evidence is also undisputed that the notices were returned to Attorney Freeland unclaimed. The evidence is also undisputed that Petitioners had no notice of the

foreclosure sale, and did not learn of said sale until several days after its occurrence. There is no evidence that the Petitioners ever attempted to "duck service". Petitioners resided and received mail continuously at their Pharr, Texas, residence from December, 1974 through and after the alleged foreclosure sale. The foreclosure sale was held on Tuesday, May 1, 1979 and some 9 days later was the first time Petitioners had any idea that their home had allegedly been sold under the provisions of the Deed of Trust. The evidence is also undisputed that Respondent/Attorney Freeland received a fee for this sale both as a Trustee and as an Attorney. The evidence is also undisputed that Respondent/Attorney Freeland had utilized for foreclosure the instruments which he originally drew up for Petitioners Dillard and Respondent Sanchez.

There is conflicting evidence over whether Attorney Freeland had informed the Dillards that he could no longer represent them and was only representing Sanchez in the foreclosure. The Dillards testified at the trial level that they had talked to Mr. Freeland (some 20 months prior to foreclosure) and were depending upon him to resolve their dispute with Respondent Sanchez. Respondent/Attorney Freeland testified that he clearly informed the Dillards that he was no longer representing them but was now representing only Mr. Sanchez.

The two federal questions raised herein were raised at every level of this case beginning at the trial level. Plaintiffs' Third Amended Original Petition (complaint on which Petitioners went to trial) raised the constitutionality of Article 3810, VACS (see Appendix, Plaintiffs' Third Amended

Original Petition, pages A26-A29). (Only those portions of Plaintiffs' Third Amended Original Petition, Appellants' Points of Error in the Corpus Court of Appeals, and the Texas Supreme Court, which raised the federal questions appear in the appendix). The first appellate level (Texas Courts of Appeals), see Points of Error Number Two and Seven, Appendix pages A30 to A31, addressed each of the 2 federal questions posed herein. Additionally, the federal questions were raised before the Texas Supreme Court under Points of Error Number One and Five, (see appendix pages A32).

A brief synopsis of the Court's actions on each of these three levels is as follows: The trial Court granted an instructed verdict on all issues against Plaintiffs and overruled their Motion for New Trial; the Corpus Christi Court of Appeals reversed in part and affirmed in part; The Corpus Christi Court again

upheld the constitutionality of Article 3810 (See Dillard v. Broyles, Tex. App., 633 SW2nd 636 at 641); additionally the Court overruled in Dillard, Petitioners' contention that Freeland was representing conflicting interests. See Appendix at A14-A22. The Texas Supreme Court refused hearing, with the notation Refused, No Reversible Error, (See Appendix page A33).

AMPLIFIED ARGUMENT

The thrust of Petitioners' argument is two fold: First, Article 3810, Texas Vernon's Annotated Statutes, as applied herein does not meet the due process requirements of the Fifth Amendment to the U. S. Constitution as applied to the States through the Fourteenth Amendment. Second, an attorney cannot, absent waiver, constitutionally, foreclose against clients when the very papers (instruments) that he is using for foreclosure, were initially drawn for

the benefit of the persons against whom he is foreclosing.

ARTICLE 3810, CONSTITUTIONALTIY QUESTION

The Texas Courts have uniformly upheld the constitutionality of Article 3810, V.A.C.S. See Armeta v. Nussbaum, 519 SW2nd 673 (Tex. Civ. App., Corpus Christi 1975, writ refused, no reversible error) and Dillard supra. The reasoning for these rulings appear to be that the Texas Courts believe that once a notice of the proposed foreclosure sale is sent by certified mail in compliance with Article 3810, the service is complete and the due process requirements are met. The fact that the letter was returned unclaimed or that the Petitioners had no actual notice of the foreclosure is of no importance. The mere act of mailing the notice by certified mail, meets the due process requirements in all cases, so the Texas Courts have ruled. See

Dillard at page 641. The Texas Courts have construed these to be "self help" statutes involving "no significant state action." (See Armeta at page 677 and Dillard at page 641).

Thus, the question that must be resolved: is there defacto "significant state action"? Petitioners herein concede that Article 3810 on its face does not directly involve state action. But the issue does not stop here. Once a foreclosure sale has been made in Texas, and a Trustee's Deed recorded, the Trustee's Deed is prima facia evidence of the recitals therein made. The Texas rule appears in Kirkman v. Amarillo Savings Association of Amarillo, 483 SW2nd 302 (Tex. Civ. App., Amarillo 1972, writ refused, no reversible error), where the Amarillo Texas Court of Civil Appeals stated in appropriate part:

> . . . .the Trustee's Deed contained factual recitations of the default and of the various steps taken in the foreclosure all in accordance with the procedural steps set forth in the deed of trust, and such recitals are presumed to be correct, unless rebutted by competent evidence. (See Kirkman at page 306, Emphasis supplied).

The practical effects of Kirkman, Armeta, and Dillard, supra, are as follows: All that is required to comply with Article 3810 is that a return receipt letter be sent to the persons against whom foreclosure is sought, and once these are sent, their receipt is irrevelant, and no other notice is required. The Courts of the State of Texas will then enforce such a foreclosure unless there are other ancillary circumstances to set it aside. In other words, the State will judicially enforce the trustee's sale and the fact that there was no actual notice is of no importance and cannot later (or ever) be raised as a defense.

Petitioners herein contend that this is, defacto, significant state involvement which should require more adequate notice and hearing requirements.

This Court has long recognized that state judicial enforcement of a private property right can be viewed as significant state involvement. In Shelley v. Kraemer, 92 L. Ed. 1161 (1948) this Court passed on the question of state court enforcement of racially restrictive deed restrictions. The Court in Shelley, supra stated in appropriate part:

> It has been recognized that the action of state courts in enforcing a subtantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment. . .We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws. . .(See Shelley, supra, at 1165 and 1166, Emphasis supplied).

Thus having concluded that state judicial enforcement of private property

rights can constitute significant state involvement, we now turn directly to the notice problem involved herein. In Joseph Greene, et al v. Linnie Lindsey, 72 L. Ed.2nd 249 (1982), this Court recently addressed the notice requirement question. This Court held, inter alia, that the Kentucky statute applicable to forcible entry and detainer actions which permitted service of process simply by posting summons on the door of the premises was violative of the due process requirements. Petitioners will concede that this statute did directly involve significant state action in that the Kentucky Courts were enforcing their forcible entry and detainer statutes by simple posting. However, Petitioners would contend that the net effect of the Texas statute and its enforcement by the Texas Courts is the same as in the Kentucky situation. As this Court so ably stated in Greene:

> The fundamental requisite of due process of law is the opportunity to be heard. . . . and the right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. . . . personal service guarantees actual notice of the pendency of a legal action; it thus presents the ideal circumstance under which to commence legal proceedings against a person, and has traditionally been deemed necessary in actions styled in personum. . . (See Greene at pages 254 and 255).

In Texas, the Courts will not allow "one to be heard" on the issue of lack of notice even when there was no actual notice. That defense is waived and the foreclosure enforced because of the fact that a private party, rather than a public entity, was charged with giving notice. Never mind there was never actual notice - the Courts will still enforce the foreclosure.

Now, consider the situation herein in light of the ruling in Greene. Petitioners buy a home and execute a number of papers including a "boiler

plate" deed of trust naming their own lawyer as the trustee for foreclosure purposes. Several years pass, and this person who had represented them in the original transaction then mails to his "ex-clients" notice of foreclosure. Petitioners both deny, under oath in their depositions and at the trial level that they had received these letters, and they twice testify each, under oath that they knew nothing of the foreclosure until some 9 days after it had happened. The person who mailed out the notice of foreclosure, Respondent/Attorney and Trustee Freeland admits that the letters were returned to him as unclaimed, and he further admits that no other notice of any type was ever attempted upon the Dillards except by the mailing of this unreceived letter. Then, the purchaser of the property (Respondent William Broyles) requests the Courts of Texas to enforce his

Trustee's Deed. The Courts of Texas, under the rationale of Kirkman, Armeta, and Dillard, supra will enforce his trustee's deed, and evict the Dillards even though the Dillards prove that they never received any notice whatsoever of foreclosure sale and they knew nothing of the foreclosure. This has the effect of having the State enforce a statute whose effect does not meet the minimum requirements of Greene, supra, nor of the due process clause of the Fifth Amendment as applied to the States through the Fourteenth Amendment. The Courts of Texas have therefore effectively circumvented the due process requirement by enforcing a state statute (Article 3810) which allows non-judicial foreclosure without effective notice. The only difference in Greene, supra, and the case at hand is that the Texas Courts don't get involved until after the foreclosure when they effectively

say, "Well, since this is a 'self-help' statute and there is no direct state involvement, we're not going to require actual or personal notice. You send it and we'll enforce it." Stated differently in Greene, supra, the State enters through the "front door" and in Dillard the State enters through the "back door". The contents of the "house" in both cases is, nevertheless, the same. However, the rationale of Greene remains the same: due process requires that one has notice he/she is about to lose his/her property right unless action is taken.

It is therefore Petitioners blunt contention that if an individual seeks to judicially enforce a so-called "self-help" statute which has notice requirements, those notice requirements must comport with the requirements of Greene, supra, and the due process clause of the Fifth Amendment.

Petitioners concede that the U. S. Fifth Circuit has upheld the constitutionality of Article 3810 in Barrera v. Security Building and Investment Corp., et al 519 F.2d 1166 (1975). However, Petitioners contend that the rationale of Barrera, supra, cannot now be squared with the notice requirements of Greene, supra. Additionally, the fact situation herein and in Barrera, supra, are very different.

ATTORNEY-CLIENT CONFLICT

The second thrust of Petitioners' argument involves the proverbial question of what is conflict of interest between an attorney and his client?

The Texas Lawyer's Code of Ethics is not much different from most other states and the federal requirements. The Texas State Bar Rules, Article 12, Section 8, Canon 5, states in pertinent part:

> If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. (See Ethical Considerations 5-15, Emphasis supplied).

The Federal Rule is very similar. In TC Theatre, Corp. v. Warner Brothers Pictures, 113 F. Supp. 265 (1953), the United States District Court for the Southern District of New York stated in applicable part:

> A lawyer's duty of absolute loyalty to his client's interest does not end with his retainer. He is enjoined for all time, except as may be released by law, from disclosing matters revealed to him by reason of the confidential relationship. Related to this principle is the rule that where any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited. (See TC and Theatre Corp. at page 268, Emphasis supplied).

It is hard to imagine a more abhorent fact situation than the one

presented herein. The facts are undisputed that Respondent/Attorney John Freeland drew up every paper involved in this transaction. He represented the Dillards and was paid a fee of some One Hundred Forty-Five Dollars ($145.00) for his services in December of 1974. He also represented Respondent Sanchez and was paid a fee of some Thirty-Five Dollars ($35.00). At the request of Respondent Sanchez, in March of 1979, Respondent/Attorney Freeland mails to the Dillards a notice of foreclosure sale to be held on May 1, 1979. Respondent/Attorney Freeland is now foreclosing as Trustee using the very same instruments which he drew up for Mr. and Mrs. Dillard.

The Corpus Christi Court of Appeals skirted this issue by simply stating in their opinion, an attorney may represent both a buyer and a seller in a land transaction. This was never disputed by

the Dillards and there is no doubt that an attorney can represent both sides in a land transaction closing. However, Petitioners herein do contend that an attorney may not represent and a Court may not enforce the representation of an attorney against his "former clients" (absent waiver) without violating the due process requirements of the Fifth Amendment as applied to the States through the Fourteenth as well as violating 42, U.S.C. 1983.

CONCLUSION

Petitioners respectfully pray that this Court grant this Application for Writ of Certiorari, and that that portion of the Texas Court of Appeals affirming the Trial Court's decision be reversed. Petitioners pray for all other relief, both general and special to which they may be entitled as they will in duty bound forever pray.

Respectfully submitted,

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Member of the State Bar of Texas and of the Bar of the Supreme Court of the United States

ATTORNEY FOR PETITIONERS

CERTIFICATE OF SERVICE AND ENTRY OF APPEARANCE -(RULE 28)

Pursuant to Rule 28, Rules of the Supreme Court of the United States, the following certification is given:

Before me the undersigned notary public for the State of Texas personally appeared Brinkley L. Oxford, known to me to be the person whose signature is affixed hereto, and after being duly sworn deposes and states as follows:

"My name is Brinkley L. Oxford. I am a licensed attorney at law with offices at 116 South 12th, P. O. Box 847, Edinburg, Texas 78539, telephone number (512) 383-5654. I am a member of the Bar of Texas and the Bar of the Supreme Court of the United States. On the 3rd day of May, 1983, I personally mailed, from the U. S. Post Office in Edinburg, Texas, with first class postage affixed and prepaid to each of the persons listed below, to the addresses shown, the number of copies of this Petition for Writ of Certiorari as indicated by each of their names. These mailings were within the time permitted by law:

TO: Frank J. Enriquez
Attorney at Law
P. O. Box 2586
McAllen, Texas 78501
(512) 682-8316

ONE COPY

TO: John Rowin
Attorney at Law
P. O. Drawer 1078
Edinburg, Texas 78539
(512) 381-0995
ONE COPY

TO: Randal G. Hanshaw
Attorney at Law
3616 N. 23rd St., Suite 1
McAllen, Texas 78501
ONE COPY

TO: Jim Mattox, Attorney General
of the State of Texas, Supreme
Court Bldg., Austin, Texas
THREE COPIES

TO: Clerk, U. S. Supreme Court
1 First Street, N. E.
Washington, D. C. 20543
FORTY COPIES

"I furthermore, in compliance with Rule 28, supra, herein make my entrance of appearance on behalf of Petitioners Dan Dillard, Jr. and wife, Sandra L. (Gorena) Dillard, and tender the sum of $200.00 for the appropriate fee."

DATED May 3, 1983."

Brinkley L. Oxford

SWORN and SUBSCRIBED to before me the undersigned notary public by the said Brinkley L. Oxford on this the 3rd day of May, 1983.

Eldisa Gonzalez
Notary Public in and for
the State of Texas

Commission expires: 1-5-85

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NUMBER 1862

COURT OF APPEALS

THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

CORPUS CHRISTI, TEXAS

* * * * * * *

DAN DILLARD, JR., ET UX, Appellants,

V.

WILLIAM H. BROYLES, ET AL, Appellees.

* * * * * * *

On appeal from the 206th District Court of Hidalgo County, Texas.

* * * * * * *

Before Paul W. Nye, C.J.; Norman L. Utter; and Noah Kennedy, J.J.

* * * * * * *

NYE, Chief Justice.

Dan Dillard, Jr., and wife, Sandra L. Dillard (appellants), brought this suit to set aside a trustee's deed, for damages for wrongful foreclosure and damages for fraud against William H. Broyles, John R. Freeland and Reymundo Sanchez. From a judgment granting instructed verdicts in the favor of all

three defendants on all causes of action, the Dillards perfected this appeal.

On or about December 23, 1974, the Dillards purchased from Sanchez a house and a lot located in the city of Pharr, Hidalgo County, Texas, which property is the subject of this instant suit. As partial consideration for the sale, the Dillards executed in favor of Sanchez a promissory note in the principal sum of $3,600.00, which note was secured by a vendor's lien and deed of trust. The Honorable John R. Freeland was the attorney representing both the buyer and the seller in the transaction. He was named trustee in the deed of trust.

Under the note, the Dillards were obligated to make monthly payments in the amount of $49.72, for a total of 108 payments, beginning February 1, 1975, to Sanchez. It is disputed whether the

Dillards made any payments on the note. In any event, all parties agree that the Dillards made fewer than six payments total, allegedly refusing to make further payments because of Sanchez' failure to make certain repairs on the house.

In a letter dated June 1, 1977, and admittedly received by the Dillards shortly thereafter, Freeland informed the Dillards that their note had been accelerated because of their nonppayment and that foreclosure would be forthcoming if they did not tender the full amount of the principal and interest then owing within 10 days. Shortly after receiving the letter, the Dillards explained to Freeland by telephone their reason for nonpayment, i.e., the alleged warranty breaches of Sanchez. Freeland replied that he would see what he could do about getting

Sanchez to fix the house, but that "the note would have to be paid." Although there was testimony as to repeated attempts to contact Sanchez with regards to fixing the house, the Dillards had no further contact with Freeland.

On or about May 1, 1979, after the written notice of the foreclosure was sent to the Dillards and was returned "unclaimed," Freeland, exercising the power given him by the deed of trust, sold the subject property to Broyles.

The Dillards here attack the adverse instructed verdicts by alleging several irregularities and inequities in the foreclosure, actionable fraud and professional misconduct on the part of defendants Sanchez and Freeland, and knowledge on the part of defendant Broyles so as to preclude Broyles from being an innocent purchaser for value of the property at the trustee's sale.

In reviewing the propriety of granting an instructed verdict generally, we must consider all of the evidence in the light most favorable to the party against whom the verdict was instructed, disregarding all contrary evidence and inferences. Seideneck v. Cal Bayreuther Associates, 451 S.W.2d 752 (Tex. 1970); Elizondo v. Tavarez, 596S.W.2d 667 (Tex.Civ.App.--Corpus Christi 1980, writ red'd n.r.e.). When reasonable minds may differ as to the truth of controlling facts, an issue of facts is presented for the trier of fact. Najera v. Great Atlantic & Pacific Tea Co., 146 Tex. 367, 207 S.W.2d 365 (1948); Elizondo v. Tavarez, supra. With these rules in mind, we will examine each of the controlling points of error presented.

The Dillards first submit that there was sufficient evidence to raise a jury issue on whether Sanchez failed to

make adequate demand of the Dillards for payment of the amount overdue and give adequate notice of intent to accelerate the entire indebtedness. Where, as here, the acceleration clause of the note is not automatic, but depends upon the exercise of an option of the mortgage to declare the whole balance due, notice of the intent to mature the entire debt must be given prior to the actual exercise of the option to accelerate. In other words, some opportunity to cure the default caused by failure to pay installments when due must be afforded the debtor before the option to accelerate may be exercised under the note. Brown v. Hewitt, 143 S.W.2d 223 (Tex.Civ.App.--Galveston 1940, writ ref'd); Jernigan v. O'Brien, 303 S.W.2d 515 (Tex.Civ.App.--Austin 1957, no writ); Crow v. Heath, 516 S.W.2d 225 (Tex.Civ.App.--Corpus Christi 1974, writ ref'd n.r.e.).

In the instant case, Dillard testified that, shortly after the closing of their purchase of the subject property from Sanchez, they received a letter from Freeland containing their copy of the recorded deed, note and deed of trust. This was in the early part of 1975. Dillard testified that the next time he heard from attorney Freeland was around the first of June, 1977, when they received the letter notifying them that the note had been accelerated and that a sale of the property under the terms of the deed of trust would be had if payment in full was not tendered within ten days. Sanchez, the seller, testified that he made no attempt to contact the Dillards (purchasers) about the debt; that he left the matter to his attorney [Freeland].

Under the standard of review announced above, we hold that this testimony alone is sufficient to entitle

the Dillards to reach the jury on the question of whether the initial step in the foreclosure process, demand for late payment and notice of intent to accelerate, was in fact taken. The Dillards' first point of error is sustained.

The Dillards next contend, in essence, that the undisputed evidence of a delay of approximately 22 months between the June 1, 1977, letter notice of acceleration and the March, 1979, mailing of written notice of the foreclosure sale was sufficient to raise issues on laches, stale demands and equitable estoppel. However, in the absence of affirmative pleadings, the Dillards cannot assert these "defenses" to the foreclosure proceedings; they are waived. Rule 94, T.R.C.P. See: Bowling v. City of Port Arthur, 522 S.W.2d 270, 273 (Tex.Civ.App.--Beaumont 1975, writ ref'd n.r.e.)(estoppel);

Danaho Refining Co. v. Dietz, 398 S.W.2d 307 (Tex.Civ.App.--Corpus Christi 1965, writ ref'd n.r.e.) (laches). Point of error number four is overruled.

The Dillards argue: that because of the time period between the notice of acceleration and the actual foreclosure; that because attorney Freeland represented both the seller and the buyer at the closing of the Dillards' purchase of the subject property from Mr. Sanchez; that because attorney Freeland was aware that the Dillards were unhappy with some aspects of the construction of their home; and that because attorney Freeland had personal knowledge of their actual address; Freeland should be held to some higher standard beyond compliance with Article 3810. We decline to so hold. In the first place, the duty prescribed by

Article 3810[1] belongs to "the holder of the debt," which in this instance is the

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[1]The duty to notify a debtor of a sale of real estate to be made under powers conveyed by a deed of trust is described by TEX.REV.CIV.STAT.ANN. art. 3810 (Vernon Supp. 1982), which provides, in pertinent part:

> "In addition, the holder of the debt to which the power is related shall at least ten days preceding the date of sale serve written notice of the proposed sale by certified mail on each debtor obligated to pay such debt according to the records of such holder. Service of such notice shall be completed upon deposit of the notice, enclosed in a postpaid wrapper, properly addressed to such debtor of the most recent address as shown by the records of the holder of the debt, in a post office or official depository under the care and custody of the United States Postal Service."

seller, Sanchez. In the second place, we know of no reason, rule or law which would require a debt holder, in similar circumstances, to do more than comply with the statute. The deed of trust involved herein required notice in accordance with article 3810. The Dillards do not specifically complain that attorney Freeland and seller Sanchez failed to comply with the trust deed notice provision.

The Dillards submit, in the alternative, that Article 3810 is unconstitutional, conflicting with the due process and equal protection clauses of the Constitutions of the United States and the State of Texas. This Court has previously upheld the constitutionality of Article 3810 in Armenta v. Nussbaum, 519 S.W.2d 673 (Tex.Civ.App.--Corpus Christi 1975, writ ref'd n.r.e.). See that opinion for

reasoning and authorities cited therein. It is uncontroverted that Freeland or Sanchez mailed to the Dillards written notice of the proposed foreclosure sale by certified mail in compliance with Article 3810. The Dillards admitted so in their petition. Service is complete upon deposit in the mail, and the fact that the letter was returned unclaimed did not place a further duty upon Sanchez or Freeland. Hausemann v. Texas Savings & Loan Association, 585 S.W.2d 796 (Tex.Civ.App.--El Paso 1979, writ ref'd n.r.e.); Martinez v. Beasley, 618 S.W.2d 689 (Tex.Civ.App.--Corpus Christi 1981, no writ). No jury issue was raised in regards to proper notification of the foreclosure sale. The instructed verdict in this part of the lawsuit was proper. Points of error numbers 5 and 7 are overruled.

The Dillards next assert there was

sufficient evidence on which reasonable minds could differ on whether "defendant Sanchez requested defendant Freeland to foreclosue on the property in question," as required by the trust deed. This contention is without merit. The deed of trust itself contained a presumption of request. The Dillards' burden was to rebut that presumption with evidence to show there was in fact no authorization. This they failed to do. Point of error number nine is overruled.

The Dillards also maintain that the trial court erred in granting an instructed verdict because there was sufficient evidence on which reasonable minds could differ on whether Sanchez received more money that allowed by law. The trustee's deed, defendants' exhibit 2, indicates the purchase price of the subject property at the foreclosure sale was $6,299.46. However, there is no

evidence in the record to indicate that this sum is greater than required to cover the debt and other authorized charges such as attorney's fees, trustee's fee, interest on past-due principal and interest or delinquent taxes. Further, there is no evidence to indicate the amount actually retained by Sanchez or whether any surplus was returned to the Dillards. In short, the record does not support the Dillards' assertion that there was sufficient evidence on which reasonable minds could differ that "defendant Sanchez received more money than allowed by law,. . . ." Therefore, point of error number ten is overruled.

The Dillards bring points of error in connection with their allegation of fraud against attorney Freeland. In the first of these, the Dillards contend they proved a prima facie case of fraud against Freeland by showing that

Freeland was representing conflicting interests contrary to State Bar of Texas, Rules and Code of Professional Responsibility EC 5-15 (1973). In order to make a prima facie showing of fraud, it is necessary that there is some evidence on each of the following elements: 1) A false statement of material facts (or silence in the face of a duty to reveal material facts); 2) Intent to induce action or inaction by the plaintiff; 3) Actual reliance thereon by the plaintiff; and, 4) Damages. Long v. Smith, 466 S.W.2d 36 (Tex.Civ.App.--Corpus Christi 1971, writ ref'd n.r.e).

The evidence is undisputed that Freeland represented both the Dillards and defendant Sanchez as buyer and seller respectively in the original real estate transaction. State Bar of Texas, Rules and Code of Professional

Responsibility, EC 5-15 (1973) reads as follows:

> "If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interest. If a lawyer accepted such employment and the interest did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally

> likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients." (Emphasis supplied)

With the agreement of the parties after a full disclosure of the facts, an attorney may properly represent both the buyer and seller in a real estate transaction. (The State Bar of Texas, Commission on Interpretation of the Code of Professional Responsibility, Opinion No. 228 (1959)). Many times it is much less expensive to all parties concerned. The Dillards were satisfied with Freelands handling of the original transaction. Dillard admitted that he was aware of Freeland's position as trustee, and understood that, as

trustee, Freeland had the power to sell the subject property in case of default. We hold that Freeland's representation of both buyer and seller in the original transaction was neither improper nor unethical.

The Dillards argue, then, that they had a continuing attorney-client relationship with defendant Freeland with regard to the subject property at all times material to this dispute.

Unless there is some special agreement, once the purpose of the employment is completed, the attorney-client relationship terminates. See Jinks v. Moppin, 80 S.W. 390, 393 (Tex.Civ.App.--1904, no writ) and Hamilton v. Hamilton, 225 S.W. 69 (Tex.Civ.App.--Austin 1920, writ dism'd). The evidence reflects that Freeland was paid by the Dillards a total of $135.00 for his services in preparing the necessary documents and coordinating the closing of their purchase of the subject

property from Sanchez. The Dillards had no further contact with Freeland until they received the demand letter of June 1, 1977. There is nothing in the record to indicate that the Dillards ever attempted to retain Freeland for any purpose after the closing of the original sale. In short, there is no evidence to support the existence of an attorney-client relationship beyond the closing date of the original real estate transaction of December, 1974.

The Dillards maintain that because they continued to rely upon Freeland for advice or because they "assumed" that Freeland continued to represent them regarding this property, Freeland's later actions as trustee were fraudulent. However, the Dillards failed to produce any evidence that Freeland misrepresented any facts with regard to their relationship or the property in question. In fact, the June 1, 1977

"demand and acceleration" letter clearly stated that Freeland was representing Sanchez in the collection matter. The Dillards point out that shortly after receiving the June 1, 1977 letter, they contacted Freeland by telephone and he agreed to talk to Sanchez about the Dillards' complaints regarding the house. We do not think this agreement amounted to a representation by Freeland that he would represent the Dillards in the matter.

The Dillards apparently feel that Freeland was under a duty to affirmatively deny that he was their attorney. However, there is no evidence that Freeland was aware that the Dillards assumed that he was their attorney in the matter. In absence of such knowledge, we decline to impose such a duty. See Smith v. National Resort Communities, Inc., 585 S.W. 2d 655 (Tex. 1979). The record is devoid

of evidence to support any of the elements necessary for a cause of action for fraud against attorney Freeland. The Dillards were not entitled to go to the jury on their claim of fraud. See Ottis v. Haas, 569 S.W.2d 508 (Tex.Civ.App.--Corpus Christi 1978, writ ref'd n.r.e.).

The Dillards also complain that the trial court erred in failing to allow the jury to consider the testimony of three licensed attorneys on the issue of representation of conflicting interests. Each of the witnesses, after qualification, was given a detailed hypothetical situation paralleling the facts of this case. They were then asked if, in their opinion, it would be a violation of the Canon of Ethics' prohibition against representation of conflicting interests for an attorney who had represented both the buyer and the seller in closing a real estate

transaction to later represent the seller in his attempt to collect his unpaid note and to fulfill his duty as trustee under the deed of trust in foreclosing upon the buyers. The trial court refused to allow the jury to consider such testimony. This ruling was a matter of law for the court to decide.

To be admissible, evidence must be relevant and material, tending to prove or disprove some issue in the case. Dallas Railway and Terminal Co. v. Oehler, 296 S.W.2d 757 (Tex. 1957). Further, the admissibility of expert testimony is a matter of discretion for the trial court, whose decision should not be disturbed without a showing of abuse of tht discretion. Bryant v. Trinity Universal Insurance Co., 411 S.S.2d 945 (Tex.Civ.App.--Dallas 1967, writ ref'd n.r.e.) and cases cited therein.

(The Corpus Christi Appellate Court then discusses and rejects Petitioners' non-federal questions of innocent purchaser, laches, estoppel, stale demands, and improper instructed verdict motions). . . .The judgment of the trial court is reversed, and a new trial is ordered on appellant Dillards' cause of action for damages for wrongful foreclosure, if any, caused by the inadequate notice, if found to exist, on the demand for late payment and intent to accelerate. In all other matters, the judgment of the trial court is affirmed. The costs shall be adjudged 2/3 against the appellant Dillards and 1/3 to the appellee Sanchez. No costs shall be adjudged against either attorney Freeland or purchaser Broyles.

REVERSED and REMANDED in part and AFFIRMED in part.

Opinion delivered and filed
this the 22nd day of April, 1982.

OPINION ON MOTION FOR REHEARING

By their fourth point of error in this appeal, the Dillards sought to raise the equitable doctrines of laches, stale demands and equitable estoppel. We overruled the point for failure to assert these matters by affirmative pleadings, as required by Rule 94, T.R.C.P. By their motion for rehearing, the Dillards have brought to our attention pleadings which we now feel were sufficient to raise the issues of laches and stale demands.

(The Corpus Christi Court of Appeals then rejected these non-federal defenses as inapplicable). . . . . .We have carefully considered the Dillards' motion for rehearing and find that it is without merit and should be overruled.

Opinion delivered and filed
this the 13th day of May, 1982.
Rehearing denied May 13, 1982.

ARTICLE 3810 - VERNON'S ANNOTATED TEXAS CIVIL STATUTES

Art. 3810. [3759][2369][2310a]
Sales under deed of trust

All sales of real estate made under powers conferred by any deed of trust or other contract lien shall be made in the county in which such real estate is situated. . . . (The posting requirements are then specified). . . . .In addition, the holder of the debt to which the power is related shall at least 21 days preceding the date of sale serve written notice of the proposed sale by certified mail on each debtor obligated to pay such debt according to the records of such holder. Service of such notice shall be completed upon deposit of the notice, enclosed in a postpaid wrapper, properly addressed to such debtor at the most recent address as shown by the records of the holder of the debt, in a post office or official depository under the care and custody of the United States Postal Service. The affidavit of any person having knowledge of the facts to the effect that such service was completed shall be prima facie evidence of the fact of service. Such sale shall be made at public vendue between the hours of 10:00 a.m. and 4:00 p.m. of the first Tuesday in any month.

Amended by Acts 1975, 64th Leg., p.2354, ch. 723, § 1, eff. Jan. 1, 1976.

NO. C-996-79-D

DAN DILLARD, JR., & WIFE, SANDRA L. (GORENA) DILLARD	§	IN THE DISTRICT COURT
VS.	§	206TH JUDICIAL DISTRICT
WILLIAM H. BROYLES, ET AL	§	HIDALGO COUNTY, TEXAS

PLAINTIFFS' THIRD AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Dan Dillard, Jr., and wife Sandra L. (Gorena) Dillard, complaining of William H. Broyles, John R. Freeland, individually and as Trustee, and Reymundo Sanchez and for cause of action would respectfully show the Court the following:

II.

F. Pleading further, and in the alternative, and without waiving any of the foregoing, Plaintiffs would show to the Court that if the Court finds that Defendant Sanchez and Freeland have complied with the requirements of notice in Article 3810, V.A.T.S., that said

Article is unconstitutional in that said Article does not require personal notice upon Plaintiffs or a reasonable attempt to attempt personal service as required by the due process clauses of the United States and Texas Constitutions.

G. Pleading further, Plaintiffs would show to the Court that Defendant Freeland is a licensed attorney at law, licensed to practice law in Hidalgo County and the State of Texas. As such, and in such capacity, Plaintiffs employed Defendant Freeland to represent them in the purchase of this property, and drawing up all of the necessary instruments involved in this transaction, and generally to give legal advice concerning this property continuously from the period of December 1974, through on or about May 1, 1979. Plaintiffs employed Defendant Freeland and retained him to represent their interest and they relied upon his legal

advise and his action in all transactions concerning this property, including their dispute with Defendant Sanchez. Unknown to them, Defendant Freeland acted adversely to their interest while he was in their employ, and did represent Defendant Sanchez in the same transactions and dispute. Plaintiffs relied upon all the representations made by Defendant Freeland, followed his legal advise, and detrimentally relied upon his representations to represent them. Consideration for his services were paid by Plaintiffs during this time. At no time did they have any actual or constructive notice that Defendant Freeland during this time period was representing Defendant Sanchez in the same transaction and dispute, and further that Defendant Freeland was attempting to take the aforementioned property from them, and divest them of same.

Such actions by Defendant Freeland constituted fraud, misrepresentation, representation of adverse parties in the same transaction, and violated the code of professional conduct and the code of ethics for attorneys licensed to practice law in the State of Texas.

POINTS OF ERROR

CORPUS CHRISTI COURT OF CIVIL APPEALS

Point of Error Number Two

The trial court erred in giving an instructed verdict for Defendant John Freeland, because there was sufficient evidence on which reasonable minds could differ, that Attorney/Defendant John Freeland was representing conflicting interests contrary to State Bar Rules, Article 12, Section 8, Canon 5, Ethical Considerations 5-1, therefore perpetrating actionable fraud upon Plaintiffs.

Point of Error Number Seven

The trial court erred in giving an instructed verdict because there was sufficient evidence on which reasonable minds could differ, because the notice requirements of Article 3810, VACS were not complied with, or in the

alternative, Article 3810 is unconstitutional by violating the due process clause of the U. S. and State Constitutions, and the equal protection clauses of said constitutions.

POINTS OF ERROR

IN THE SUPREME COURT OF TEXAS

Point of Error Number One

The Court of Appeals erred in holding that there was insufficient evidence on which reasonable minds could differ that attorney/Defendant John Freeland was representing conflicting interests, that Defendant Reymundo Sanchez knew or should have known of the actions of his attorney Freeland, and that the actions of attorney/Defendant Freeland were not fraudulent. (See ruling of Court granting Motions for Instructed Verdict in Volume 2, Page 284 and Volume 4, Page 1, SF).

Point of Error Number Five

The Court of Appeals erred in holding that the notice requirements of Article 3810, VACS, were complied with, or in the alternative, Article 3810 is constitutional. (See Trial Court's ruling granting motions for instructed verdict).

(THE STATE OF TEXAS SEAL)

THE SUPREME COURT OF TEXAS
P. O. Box 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

CHIEF JUSTICE
JACK POPE

JUSTICES
S. McGEE
C. BARROW
R. CAMPBELL
F. SPEARS
C. RAY
J. WALLACE
T. ROBERTSON
W. KILGARLIN

CLERK
G.R. JACKSON

EXEC. ASS'T.
WM. L. WILLIS

AD. ASS'T.
M. DEFIBAUGH

February 2, 1983

(TO ALL COUNSEL OF RECORD):

Dear Sirs:

Petitioners' motion for rehearing of application for writ of error in the case of No. C-1359, DAN DILLARD, JR. ET UX v. WILLIAM H. BROYLES ET AL was this day overruled.

Very truly yours,

GARSON R. JACKSON,
Clerk

By: /s/ Fritzi Born,
Deputy

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